



Council of the  
**INSPECTORS GENERAL**  
on INTEGRITY and EFFICIENCY



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Next Meeting:

October 13, 2009

10 am

GPO

Carl Hayden Room

## **Survey Results on Proposed Testimonial Subpoena Authority for Inspectors General**

Recent proposed legislation would provide new testimonial subpoena authority to certain IGs. S. 1390 and S. 1391, the Department of Defense (DOD) authorization bills, would provide the DOD IG with authority to subpoena witnesses and testimony, after consultation with and without objection by, the Attorney General, before issuance. In contrast, H.R. 885 would provide IGs of five financial oversight entities (Federal Reserve Board, Commodity Futures Trade Commission, National Credit Union Administration, Pension Benefit Guaranty Corporation, and the Securities and Exchange Commission) the authority, without the need to consult with the Attorney General, to subpoena testimony from contractors, grantees, subcontractors, subgrantees, or entities regulated by the establishment.

Because these two legislative proposals differ significantly and do not include the rest of the IG community, the CIGIE Legislation Committee is concerned about a piecemeal approach to expansion of IG subpoena authority. Building upon a previous survey on the issue, the CIGIE conducted a more comprehensive survey of the IG community to develop a consensus on this issue.

While developing the survey, the CIGIE Legislation Committee researched the present state of testimonial subpoena authority in the Executive branch. We found a 2001 report by the Department of Justice (DOJ), [Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities](#). The report found approximately 335 existing subpoena authorities in the Executive Branch. Our review of this report reflected that none of the agencies that have testimonial subpoena authority have any limitation in statute for an external review or consultation before issuance of such subpoenas.

### **Survey Results**

#### *Overwhelming Support For Testimonial Subpoena Authority*

We surveyed the 69 CIGIE members, and received substantive responses from 49 members, reflecting a greater than 70% participation rate. Our survey revealed that 94% of the respondents support "expanding the IG subpoena authority to include compelling testimony from non-Federal agency witnesses." Virtually all IGs agreed that this new authority would enhance their ability to conduct thorough audits and investigations, particularly in procurement fraud matters dealing with private contractors or grantees.

#### *Examples of Benefits of Testimonial Subpoena Authority*

More than 30 IGs provided examples of how the authority to compel testimony would have helped in their past investigations or audits. In general, IGs recounted problems with getting cooperation from private contractors and former employees in their audits or investigations. This lack of cooperation either led to incomplete audits or closed investigation cases. Other IGs noted that the testimonial subpoena authority would help them with access to witnesses who can explain the context and importance of documentary evidence as well as witnesses who may be reluctant to provide information for fear of reprisal (such as loss of business or employment) unless they were required to by subpoena.

*DOJ Consultation and Approval Before Subpoena Issuance*

Almost 70% of the respondents believe that any expanded testimonial subpoena authority should not be subject to any statutory limitation. Some IGs cited the 2001 DOJ report, discussed above, that revealed that no other agency with testimonial subpoena authority is limited by statute to any review or consultation with the Attorney General before subpoena issuance.

However, if a DOJ consultation and approval requirement, as outlined presently in the DOD Authorization Bills, would be the only possible way to obtain the authority, a majority of IGs (65%) would support the expanded testimonial subpoena authority. However, this support was tepid at best (for example, one respondent stated: "better than no authority"), and was qualified on the condition that no other avenue was possible to get this authority.

The majority of IGs who provided comments on the issue of DOJ consultation were clear that they did not support such consultation and approval and believed it would significantly limit the authority's effectiveness. Moreover, some respondents expressed concern that a consultation requirement would infringe on the independence of an IG under the IG Act to conduct audits and investigations since DOJ could effectively veto an investigation if it did not approve a subpoena. Additionally, respondents noted that such consultation would be time consuming and burdensome, and unnecessary for audits, reviews, or administrative cases, as these would not be the subject of criminal or civil prosecution.

*Support for CIGIE-Issued Guidelines on the Proper Use of Testimonial Subpoena Authority*

A substantial majority of the respondents (86%) believe that guidelines on the proper use of the testimonial authority by IGs should be developed to ensure a uniform and consistent use of this authority. The guidelines may address such issues as applicable witness warnings, 5<sup>th</sup> Amendment self-incrimination issues, counsel and union representation, privilege issues, coordination with U.S. Attorneys, and other matters of concern.

Notably, the majority of respondents (62%) believe that CIGIE should develop these guidelines with appropriate DOJ consultation; only 13% thought that DOJ should issue guidelines with CIGIE consultation. As one IG succinctly stated, if CIGIE develops guidelines there is a greater likelihood that they would reflect the "interests, concerns, and limitations" of the IG community. At the same time, some IGs believe that CIGIE consultation with DOJ to develop the guidelines is necessary as DOJ would ultimately be involved in the enforcement of these subpoenas in case of compliance refusal.

**Pending Matters**

*Technical Amendments to the IG Reform Act*- The Legislation Committee recently distributed proposed technical amendments to the IG Reform Act to CIGIE members. We are asking for any comments by September 30.

*H.R. 1507 and S. 372*, both titled the "Whistleblower Protection Enhancement Act of 2009," would amend the Whistleblower Protection Act of 1989 by providing additional protections to employees and contractors who report agency misconduct. S. 372 would require the establishment of an Ombudsman in each covered OIG to educate employees about whistleblower rights and advise and advocate on behalf of employees who make protected disclosures. The Legislation Committee is planning to conduct a survey to evaluate the IG community's reaction to the Ombudsman requirement.

*S. 1508/H.R. 3393*, the "Improper Payments Elimination and Recovery Act of 2009," would amend the Improper Payments Act of 2002 by imposing additional controls on agency programs that may be susceptible to improper payments. Among other things, the legislation would require agency heads to periodically review all programs and operations that may contribute to improper payments and to report on efforts to reduce or recover improper payments. IGs would be required to issue annual reports on their agencies' compliance with the Act. The Legislation Committee is reviewing the legislation and gathering comments from other Committee members.

*S. 976*, introduced by Senator Charles Grassley (R-IA), would exempt from the Paperwork Reduction Act (PRA) information collected during the conduct of any investigation, audit, inspection, evaluation, or other review conducted by a Federal Office of Inspector General. The Bill has been referred to the Senate Committee on Homeland Security and Governmental Affairs. The Legislation Committee has been seeking meetings with HSGA staff to discuss this legislation and proposed amendments to the Computer Matching Act.

**FOR MORE INFORMATION ON PENDING LEGISLATION AFFECTING THE IG COMMUNITY PLEASE [CLICK HERE](#).**